



**Mwanga v Eden Reforestation Projects (Cause E088 of 2022)
[2024] KEELRC 340 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 340 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E088 OF 2022
DKN MARETE, J
FEBRUARY 21, 2024**

BETWEEN

VICTOR MWANGA CLAIMANT

AND

EDEN REFORESTATION PROJECTS RESPONDENT

JUDGMENT

1. This matter was originated by way of a memorandum of Claim dated February 4, 2022. The issue in dispute is therein cited as;
2. The wrongful and unlawful termination of employment of Victor Mwanga
3. The Respondent in a Respondent’s Replying Memorandum dated April 14, 2022 denies the claim and prays that the same be dismissed with costs.
4. The Respondent further raises a counter claim for his directorship of the Respondent that was obtained illegitimately and through misrepresentation, intimidation and manipulation on his part. The Respondent’s counter claim is as follows;
 - a. Damages for breach of the Employment Agreement;
 - b. An order that the Claimant be removed as a Director of the Respondent Company; and
 - c. Costs of this suit.
5. The claimant’s case is that on or about June 11, 2020, the Respondent offered and he accepted employment as National Director at a salary of Kshs.250,000.00 per month. This was excluding other allowances and was increased to Kshs.368,828.00 as at the time of his termination from employment.
6. The claimant’s further case is that he served dedicatedly and honestly throughout his term and was able, ready and willing to offer such service throughout his entire stint of service.



7. His other case is that by a letter dated October 27, 2021, he was summarily dismissed without any justifiable cause or an allegation of misconduct against him touching on disrespect and inappropriate email exchanges with his supervisors.

8. It is his further case that the termination for employment was malicious and without regard to the claimants welfare and rights thereof accrued. This is expressed as follows;

Particulars of Malice

- a. Failing to give the Claimant any notice of the intended termination.
- b. Failing to give the Claimant a fair hearing or at all in a summary manner,
- c. Terminating the services of the claimant without any basis or justification for so doing.
- d. Terminating the services of the Claimant while he was on sick leave.
- e. Terminating the Claimant's services without any valid reasons for so doing.

9. He again claims unfair and discriminatory treatment as follows;

Particulars of Discrimination

- i. Discriminating against the Claimant by isolating him for alleged termination without any basis and/or justification.
- ii. Replacing the Claimant with another employee without considering the existence of the Claimant's contract.
- iii. Singling out the Claimant in the alleged termination.
- iv. Appointing the Claimant's replacement after unlawfully terminating his services.
- v. Violating the Claimant's constitutional right to fair hearing and Lawful expectation.

10. He therefore suffered financial loss and claim twelve (12) months compensation for unlawful termination of employment all amounting to Kshs.4,161,930.00.

He prays thus;

- a. Reinstatement to his previous position/job without any loss of benefits.
- b. Salary arrears for the entire period the claimant has been out of employment.
- c. Damages for violation of the Claimant's Constitutional rights.
- d. Exemplary damages.
- e. Damages for wrongful and/or unlawful termination as set out at par. 8 hereinabove.
- f. Maximum 12 months compensation for wrongful termination.
- g. Costs of this suit with interest thereon.

11. The Respondent's case is one of denial to the claim. She however admits that the claimant was her former employee having been incepted as National Director with effect June 10, 2020. She further



avers that by an Employment Agreement dated June 11, 2020, the Respondent employed the Claimant in the position of National Director effective from June 10, 2020 under Clause 2 of the Claimant's Africa Area Co-directors. The Respondent however avers that the Claimant's gross salary at the time his employment was terminated was Kes.346,828.00 per month.

12. The Respondent's further case is that the claimant's state of service was marred with acts of gross misconduct and insubordination which subsequently led to the termination of employment. This is as follows;
- a. On 11 November 2020, one of the Respondent's African Area Co-Directors, Alex de Sosa Kinzer, wrote an email to the Claimant and other employees, pursuant to her supervisory role over the Claimant and other employees, requesting for some details on an expense that had been incurred by the Respondent.
 - b. On the same day, after the issue had already been resolved and a clarification on the expense given by another employee, the Claimant wrote back to the Co-Director rudely criticizing her exercise of her supervisory duty, which was in any event done in good faith and as required of her role as one of the Co-Directors of the Respondent's subsidiary in Kenya. The Claimant proceeded to reprimand the Co-director and threatened to end his employment with the Respondent.
 - c. On 12 November 2020, a mediation session was conducted between the Respondent's Co-Directors and the Claimant to address the Claimant's conduct. The Claimant was informed that his email was disrespectful and did not adhere to the core values of the Respondent.
 - d. On 8 June 2021, the same Co-Director wrote an email to the Claimant and another employee issuing lawful instructions directing them to reduce their purchases of forest soil and develop compost heaps to include in the Respondent's potting mix as it was a more cost efficient and sustainable model of achieving the Respondent's reforestation goals.
 - e. On the same day, the Claimant wrote back to the Co-Director irrationally and aggressively opposing the instructions issued. Following this incident, the Co-Directors issued a verbal warning to the Claimant that his email was disrespectful and that such communications would not be tolerated moving forward.
 - f. It would later come to the Respondent's knowledge that the reason for the Claimant's opposition to cutting back on the purchase of forest topsoil was because the Claimant was illegally and irregularly benefiting from the procurement of the forest topsoil was purchased through the Forest User Groups, while in reality, the same was being offered to the Respondent at no cost to further their reforestation goals. The Respondent had therefore, been disbursing funds to the Claimant to purchase a resource that was being obtained by the Claimant at no cost.
 - g. Sometime in October 2021, the Respondent's Co-Directors received complaints relating to the toxic work environment created by the Claimant who was treating other employees working under him unprofessionally and disrespectfully. When the Claimant was Claimant again sent an inappropriate email to the Co-Directors' exercise of their supervisory role over him and other employees.
 - h. On the same day, one of the Respondent's Co-Directors Andrew Kinzer, sent an email to one of the Respondent's employees requesting him to mentor and guide a new employee in the Respondent's Mozambique subsidiary. The Claimant proceeded to again send an inappropriate email to the Respondent's Co-Directors, copying in the Respondent's CEO/



Founder, the Director of International Operations and the National Director Mozambique. In the email, the Respondent again rudely questioned and criticized the Co-Director's exercise of their lawful roles within the Respondent's organization demanding and asserting that the Co-Directors, who were the Claimant's direct superiors and supervisors, had no right to give the employee instructions directly without consulting him.

- i. Given the gross misconduct exhibited by the Claimant, the Respondent's Co-Directors invited the Claimant to a disciplinary hearing on 27 October 2021. The Claimant initially declined to attend the disciplinary hearing but later went to the hearing late. Within moments of beginning the hearing, the Claimant, however, lost his temper and began making phone calls to various parties canvassing for support to paralyze the Respondent's operations. The Claimant then left the hearing abruptly in a huff, thereby ending the hearing prematurely.
 - j. Owing to the Claimant's deliberate disruption of the hearing, his unwillingness to participate in the disciplinary process and his threats of harm to the Respondent's Co-Directors, the Respondent made a lawful decision to summarily dismiss the Claimant with immediate effect for gross misconduct pursuant to Section 44(3) and (4)(d) of the Employment Act, 2007. Subsequently, the Respondent issued the Claimant with a Termination Notice dated 27 October 2021.
 - k. By a subsequent letter dated 27 October 2021, the Respondent offered to pay the Claimant gratuity on an *ex-gratia* basis for the duration he had been employed by the Respondent, one (1) month's salary in lieu of notice on an *ex-gratia* basis as he was not entitled to notice pay having been summarily dismissed, his salary for the month of October 2021 and accrued leave days.
 - l. The Claimant later appealed against the termination of his employment. On 4 November 2021, the Respondent's Appeal Committee met virtually to consider the Claimant's appeal. By a ruling delivered on 9 November 2021, the Respondent's Appeal Committee, having considered the circumstances of the termination of the claimants employment, and especially his menacing conduct during the disciplinary hearing, dismissed the claimants appeal and upheld the termination of his employment.
 - m. On 9 November, 2021 the claimant was duly paid the first instalment of his terminal dues. On 16 November 2021, having now cleared with the Respondent, the claimant was paid the rest of his terminal dues.
13. The matter came for hearing on 24th May 2023 where the parties testified in support of respective cases.
14. The issues for determination therefore are;
1. Whether the termination of the employment of the claimant by the Respondent was wrongful, unfair and unlawful.
 2. Whether the Respondent is entitled to the counter claim as sought.
 3. Whether the claimant is entitle to the relief sought.
 4. Who bears the costs of the case.
15. The 1st issue for determination is whether the termination of the employment of the claimant by the Respondent was wrongful, unfair and unlawful. The claimant in his written submission dated 5th June, 2023 brings out the case of wrongful unfair and unlawful termination of employment and a violation of section 41 and 43 of Employment Act, 2007. These provides for fair procedure in



the situation of termination of employment coupled with a proof of valid reasons for dismissal on termination.

16. The claimant further cites the absence of a fair disciplinary process which did not satiate the requisition of section 41 aforesaid. He sought to rely on various authorities as follows;

Mugo v Teachers Service Commission (Employment and Labour Relations Cause E028 of 2021) [2022] KEELRC 13180 (KLR)

...court found in favour of the claimant whose termination of the employment by the respondent was wrongful, unfair and unlawful based on failure by the respondent to take cognizance of the Claimant's state of health at the material time as well as failing to consider the performance track record amongst other grounds. The court also ordered that the Claimant be reinstated back to employment without loss of emoluments, rank and promotion.

17. Again, he sought to rely on authority of *Mercy Omondi Omollo v Rama Homes Ltd* ELRC Cause No. 89 of 2020 where the Claimant was found to have suffered an unfair termination at the hands of the Respondent. The Court further held that the Claimant held a senior position of HR Manager and the Respondent had a duty to treat her with respect and uphold her dignity as a Senior Manager. She was awarded compensation for the unlawful and unfair termination.

18. The Respondent in her elaborate written submission dated June 20, 2023 reiterates her case and submits a case of lawful termination of employment. It is her case that the Claimant was afforded substantive fairness in the termination of his employment by applying section 44(4)(d) of the *Employment Act*, 2007 which provides for summary dismissal of an employee in the event of gross misconduct.

19. It is Respondent's further submission that the claimant conduct as set out above and the actions recounted, amounted to insubordination under Section 44(4)(d) of the *Employment Act*, 2007. This is as illustrated in the authority of *Abraham Gumba vs. Kenya Medical Supplies Authority* [2014] eKLR where the court at paragraph 52 held as follows;

“under the *Employment Act*, 2007, both forms of insubordination are captured under Section 44(4)(d) and (e) – Verbal insubordination is described in our law under section 44 (4)(d) to occur where “an Employer uses abusive or insulting language or behave in a manner insulting to his employer or to a Person placed in authority over him by his Employer”

20. The evidence adduced in the email correspondence at pages 7 to 18 of the Respondent's bundle of documents dated 14 April, 2022 is demonstration of pattern where the claimant would demean the authority of his direct supervisors and persisted to do so despite the issuance of verbal and written warnings via emails.

21. The Respondent again recounts a case of procedural fairness by demonstrating that the claimant was taken through disciplinary proceedings but did not take these seriously. Instead, he went out of his way to demean, frustrate and rubbish the same. She submits and relies on the authority *Banking Insurance & Finance Union (Kenya) vs Barclays bank of Kenya Ltd* [2014] eKLR where the court found that a former employee could not claim that his employees had failed to comply with the provisions of Section 41 of the *Employment Act*, 2007 where the employee frustrated the disciplinary process by failing to attend such hearings.



22. This is a clear-cut and an all telling case. A scrutiny of the evidence tendered in support of the Respondent's case surmounts that of the claimant. It is apparent that the claimant was a thankless bully who would at the slightest opportunity gets out of his way to abuse and vilify his seniors and supervisors, the Directors of the organization. This was ably demonstrated at the hearing of this matter as well as by documents adduced in support of the Respondent's case. This is not rebutted by the Claimant's case, or at all.
23. The Claimant as failed to satiate the provisions of section 47(5) of the Employment Act, 2007 on burden of proof of unfair termination of his employment contract. This provides as follows;
- For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
24. I therefore find a case of lawful termination of employment and hold as such. This answers the 1st issue for determination.
25. The 2nd issue for determination is whether the Respondent is entitled to the counter claim as sought. The Respondent in her evidence in chief elaborately brings out the case of the Claimant crafting and mischievous way of getting to the provision of a director of the Respondent. This was by some false and fraudulent allegations of the need for a local to be made a director of the organization least of which her viability and acceptance would be in issue. This is the evidence and submission of the Respondent and involved bulldozing the management and leadership of the Respondent into making him a Director thereof. This is not acceptable and can rightly be termed and deemed an unfair labour practise contrary to the constitutional and legal provision on employment affairs. I therefore allow and hold that the Respondent is entitled to the counter claim as prayed.
26. The award of the counter claim is limited to prayer (b) which seeks that the claimant be removed as a Director of the Respondent Company which I hereby order be so.
27. The other issue for determination is whether the Claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment, he becomes disentitled to the relief sought.
28. I am therefore inclined to dismiss the claim and in limitation, allow the counter claim with orders that each party bears their costs on the same.

DELIVERED, DATED AND SIGNED THIS 21ST DAY OF FEBRUARY 2024.

D. K. NJAGI MARETE

JUDGE

Appearances:

1. Miss Okondo holding brief for Guserwa instructed by J.A Guserwa & Company Advocates for Claimant/ Applicant.
2. Mr. Kyalo holding brief for Munyu instructed by Iseme, Kamau & Maema Advocate for the Respondent.

